

## **CUMULATIVE DIGEST**

### **CH. 3 ARMED VIOLENCE**

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### §3-1 Generally

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### §3-2 “Armed with a Dangerous Weapon”

**People v. McBride**, 2012 IL App (1st) 100375 (No. 1-10-0375, 5/17/12)

Defendant was charged with aggravated vehicular hijacking under the pre-amended version of 720 ILCS 5/18-4(a), which defined the offense as committing vehicular hijacking while “armed with a dangerous weapon.” The evidence at trial showed that the defendant approached the complaining witness with a handgun which he held to the complainant’s forehead and which caused a bruise and a small amount of bleeding. The court found that there was sufficient evidence to allow the jury to find that the handgun was used as a dangerous weapon.

1. Under **People v. Ross**, 229 Ill. 2d 255, 891 N.E.2d 865 (2008), a weapon may be dangerous in one of three ways. First, weapons such as loaded guns are dangerous *per se*. Second, some objects which are not dangerous *per se* are considered dangerous because they were actually used in a dangerous manner during the offense. Third, some objects that are not dangerous *per se* are considered dangerous because they potentially could be used in a dangerous matter.

Under **Ross**, the trier of fact cannot presume that an object which has the outward appearance of a gun is loaded and operable, because such a presumption would shift to the defendant the burden of proving that the object was not dangerous. Instead, the State must prove dangerousness either by presenting evidence that the gun was loaded and operable or by showing that it either was used or was capable of being used as a bludgeon. Where the State fails to present evidence that a gun was loaded and operable, used in a dangerous manner, or capable of being used in a dangerous matter, as a matter of law it fails to prove dangerousness.

Because the handgun was actually used as a bludgeon and caused injury when the defendant forced it against the complainant’s forehead, the jury had sufficient evidence to find that the gun was dangerous. Therefore, defendant’s reasonable doubt challenge was rejected.

2. The court concluded, however, that the trial court committed reversible error when it gave a supplemental instruction concerning the definition of “dangerous weapon.” The trial court instructed the jury that the elements of aggravated vehicular hijacking include that the defendant was “armed with a dangerous weapon.” During deliberations, the jury sent a note to the trial judge asking for the definition of “dangerous weapon.” After consulting with counsel, the trial court gave a supplemental instruction combining the definition of “dangerous weapon” from the armed violence statute and a definition from Black’s Law Dictionary. Defense counsel objected to giving the definition from the armed violence statute.

The Appellate Court found that the supplemental instruction was erroneous because it informed the jury that a person is considered armed with a dangerous weapon if he carries a Category I, Category II, or Category III weapon, and defined a Category I weapon as a “handgun, sawed-off shotgun, sawed-off rifle, any other firearm small enough to be concealed

upon the person, semi-automatic firearm, or machine gun.” The court concluded that this instruction could have misled the jury into believing that the handgun used by the defendant was dangerous *per se*, thus relieving the State of its obligation to prove that the weapon was either loaded and operable, actually used as a bludgeon, or capable of being used as a bludgeon. Because the supplemental instruction could have relieved the State of its burden to prove that the gun was a dangerous weapon, reversible error occurred.

The court concluded that the error was not harmless where the only issue at trial was whether defendant was armed with a dangerous weapon, a finding of dangerousness could only have been based on a finding that the gun was actually used as a bludgeon, and the supplemental instruction allowed the jury to sidestep that issue simply because the weapon was a handgun.

The conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

**People v. Scott**, 2011 IL App (2d) 100990 (No. 2-10-0990, 8/9/11)

A person commits armed violence when, “while armed with a dangerous weapon, he commits any felony defined by Illinois [l]aw [with certain exceptions].” 720 ILCS 5/33A-2(a). The purpose of the statute is to deter felons from using dangerous weapons so as to avoid the deadly consequences that might result if the felony victim resists. One is “armed” within the meaning of the statute when the weapon is either on one’s person or one has immediate access to and timely control over the weapon. Mere possession of a dangerous weapon is not sufficient if there is no possibility of an imminent threat of violence.

Defendant admitted that he possessed cannabis with intent to deliver. When the police arrived outside defendant’s home, he was on a couch, a foot or two from a love seat under which he had placed a shotgun. Defendant would have had little difficulty reaching for and taking control of the shotgun, despite the presence of a coffee table, when the police opened his door. The shotgun’s presence created the type of danger that the armed-violence statute was intended to prevent, even though defendant did not reach for the shotgun, he offered the police no resistance, and no actual violence occurred. The potential for violent encounters, not whether any such encounters take place, is the concern of the armed-violence statute.

“The evidence showed that defendant was in the business of selling cannabis, an enterprise that he knew was dangerous, and that he protected his business with his shotgun, kept close to his merchandise.” The court affirmed the armed violence conviction.

**People v. Westmoreland**, 2013 IL App (2d) 120082 (No. 2-12-0082, 9/24/13)

1. 720 ILCS 5/33A-2(a) provides that a person commits armed violence by committing any felony while armed with a dangerous weapon. Under 720 ILCS 5/33A-1(c)(1), a person is armed with a dangerous weapon when he carries or is otherwise armed with a Category I, Category II, or Category III weapon.

Defendant was charged with armed violence for committing domestic battery by beating a child with a studded belt, which the State alleged was a Category III weapon. A Category III weapon is defined as a “bludgeon, black-jack, slungshot, sand-bag, sand-club, metal knuckles, billy, or other dangerous weapon of like character.” 720 ILCS 5/33A-1(c)(3).

2. The court concluded that the studded belt did not qualify as a Category III weapon because it was not of like character to a “bludgeon, black-jack, slungshot, sand-bag, sand-club, metal knuckles, [or] billy,” the other objects defined as Category III weapons. The court concluded that to constitute a Category III weapon, an object must be “an inherently dangerous weapon” of like nature to the items specified in §33A-1(c)(3).

A “bludgeon” is generally described as a short stick used as a weapon and having one thick, heavy, or loaded end. An article of clothing, even if capable of being used as a bludgeon, is not an inherently dangerous weapon that is similar to a bludgeon. Furthermore, there was no evidence that the belt had been altered to make it more bludgeon-like or suitable for use as a weapon. Under these circumstances, the belt was not a Category III dangerous weapon.

The armed violence conviction was reversed and the cause remanded for sentencing on the lesser included offense of aggravated battery of a child.

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

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### §3-3

#### **Double Enhancement and Improper Predicate Felonies**

**People v. Cherry**, 2014 IL App (5th) 130085 (No. 5-13-0085, 12/10/14)

Aggravated battery occurs where the accused: (1) intentionally or knowingly causes great bodily harm while committing a battery (720 ILCS 5/12-4(a)), or (2) commits a battery while using a deadly weapon other than by “the discharge of a firearm.” (720 ILCS 5/12-4.2(a)(1)). The offense of aggravated battery with a firearm occurs when in committing a battery the accused knowingly or intentionally causes any injury to another person by means of discharging a firearm. 720 ILCS 5/12-4(a)(1), (b).

720 ILCS 5/33A-2(b) defines armed violence as personally discharging a firearm that is a Category 1 or Category 2 weapon while committing any felony other than certain specified felonies “or any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range.”

Defendant was convicted of one count of aggravated battery with a firearm and one count of armed violence predicated on aggravated battery. The armed violence charge alleged that defendant caused great bodily harm “while armed with a dangerous weapon” by shooting the complainant in the leg with a handgun that was a Category I weapon.

1. The Appellate Court held that under the plain language of §33A-2(b), armed violence cannot be predicated on any form of aggravated battery even where that offense is charged under §12-4(a). The court concluded that because aggravated battery with a firearm is an enhanced version of aggravated battery, §33A-2(b) specifically excludes the latter offense as a predicate for armed violence.

Noting that defendant was also convicted of aggravated battery with a firearm based on the same conduct, the court stated:

[I]t would be patently unreasonable to conclude that the prosecution may both charge the defendant with an enhanced version of an offense and then also predicate an armed violence charge on a subsection of the same basic offense that does not specifically address weapons in order to sidestep the statutory exclusions.

The conviction for armed violence was vacated and the cause remanded for sentencing on the remaining conviction of aggravated battery while armed with a firearm.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

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